

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE: PROTOCOL LITIGATION
CASE NO: 2:11CV1016

Telephonic conference hearing at
the U.S. District Court, 200 West Second Street,
Dayton, Ohio at 9:02 a.m., on Tuesday, June 26th,
2018, before Jamie S. Hurley, Court Reporter and
Notary Public within and for the State of Ohio.

PRESENT:

Honorable Magistrate Judge Michael Merz
Ms. Janice R. Konya-Grabill
Mr. Jim Smerbeck
Ms. Kelly Kopf
Mr. Adam Rusnak, via telephone
Mr. Allen Bohnert, via telephone
Ms. Vicki Werneke, via telephone
Mr. Randall Porter, via telephone
Mr. David Stebbins, via telephone
Mr. Stephen Gray, via telephone

1 Ms. Jocelyn Lowe, via telephone
2 Mr. Charles Wille, via telephone
3 Mr. Larry Komp, via telephone
4 Ms. Zoe Saadey, via telephone
5 Ms. Kate McGarry, via telephone
6 Ms. Adrienne Larimer, via telephone
7 Mr. Steven Kissinger, via telephone
8 Ms. Erica Lahote, via telephone
9 Mr. David Doughten, via telephone
10 Mr. Michael Benza, via telephone
11 Ms. Rachel Troutman, via telephone
12 Mr. Richard Cline, via telephone
13 Ms. Kimberly Rigby, via telephone
14 Ms. Kandra Roberts, via telephone
15 Ms. Kim Hoffman, via telephone

16 * * * * *

17
18
19
20
21
22
23
24
25

1 JUDGE MERZ: Good morning, ladies
2 and gentlemen. This is Case Number 2:11CV1016 In
3 Re: Ohio Execution Protocol Litigation set for
4 telephone status conference this morning. As
5 usual, I'll begin by calling the role. Present
6 here in Dayton are myself, Michael Merz, death
7 penalty law clerks, Jan Konya-Grabill and Jim
8 Smerbeck. And Lisa Lagos, are you there?

9 MR. RUSNAK: Ms. Lagos won't be
10 joining us this morning, Your Honor. This is Adam
11 Rusnak.

12 JUDGE MERZ: Thank you, Adam. So
13 I know you're there. That's, R-U-S-N-A-K. We have
14 a new reporter this morning, so be particularly
15 good about stating your names when you speak. Jim
16 King? No. Not present. Allen Bohnert?

17 MR. BOHNERT: Good morning, Your
18 Honor. I'm here.

19 JUDGE MERZ: Good morning, Allen.
20 Vicki Werneke?

21 MS. WERNEKE: Good morning, Your
22 Honor.

23 JUDGE MERZ: Good morning. Erin
24 Barnhart?

25 MR. BOHNERT: Ms. Barnhart, also,

1 won't be joining us this morning, Your Honor. This
2 is Adam again.

3 JUDGE MERZ: Randall Porter?

4 MR. PORTER: Present, Your Honor.

5 And I, Kathy Sanford, who is trial attorney for
6 Ralph Lance and James Trimble, has another
7 commitment this morning. I'll be filling in for
8 her, and I'm co-counsel on both cases.

9 JUDGE MERZ: Thank you, sir.
10 David Stebbins?

11 MR. STEBBINS: Present, Your
12 Honor.

13 JUDGE MERZ: Good morning.
14 Stephen Gray?

15 MR. GRAY: Good morning, Your
16 Honor. With me is Jocelyn Lowe, as well.

17 JUDGE MERZ: Great. Good morning,
18 Jocelyn.

19 MS. LOWE: Good morning, Your
20 Honor.

21 JUDGE MERZ: Other folks on the
22 call don't know about this, but Steve helped me
23 resolve a habeas case involving somebody whose
24 post-release control was going to be imposed either
25 in person or by electronically, and Steve helped

1 expedite that, and I thank you for that. And it's
2 not an ex parte communication about this case, but
3 I want to be thorough about that.

4 MR. GRAY: Thank you, Your Honor.

5 JUDGE MERZ: Adele Shank? Adele
6 Shank? Not present. Charles Wille?

7 MR. WILLE: Here, Your Honor.

8 JUDGE MERZ: Good morning. David
9 Picken?

10 MS. SAADEY: Mr. Picken will not
11 be joining us, Your Honor. This is Zoe Saadey.

12 JUDGE MERZ: Thank you, Zoe. I've
13 marked you present. Carol Wright? Carol?

14 MR. RUSNAK: Your Honor, this is
15 Mr. Rusnak. I don't think Ms. Wright will be
16 joining us either this time.

17 JUDGE MERZ: All right. Thomas
18 Madden?

19 MS. SAADEY: Your Honor,
20 Mr. Madden will not be joining us.

21 JUDGE MERZ: Steven Kissinger?
22 Not present. David Doughten?

23 MR. DOUGHTEN: Present, Your
24 Honor.

25 JUDGE MERZ: Thank you. Steven

1 Ferrell? Not present. Richard Cline?

2 MR. CLINE: Here, Your Honor.

3 JUDGE MERZ: Thank you. Kandra
4 Roberts?

5 MS. ROBERTS: Here, Your Honor.

6 JUDGE MERZ: Kim Hoffman?

7 MS. HOFFMAN: Here, Your Honor.

8 JUDGE MERZ: Kim, when we're done
9 with this call, if you'll call me back, I have some
10 news from Washington. I was told there were 18
11 people on the call by AT&T. Whose name have I not
12 called?

13 MS. TROUTMAN: Rachel Troutman,
14 Your Honor.

15 JUDGE MERZ: Rachel?

16 MS. TROUTMAN: Troutman.

17 JUDGE MERZ: Rachel Troutman,
18 T-R-O-U-T-M-A-N. Thank you, Rachel. Good morning.
19 Anybody else?

20 MS. RIGBY: Kimberly Rigby, Your
21 Honor.

22 JUDGE MERZ: Anybody else?

23 MS. RIGBY: Kimberly Rigby, Your
24 Honor.

25 JUDGE MERZ: Still don't have it.

1 MS. RIGBY: Kimberly Rigby, Your
2 Honor.

3 JUDGE MERZ: Kim, good morning.
4 R-I-G-B-Y, for the reporter. Anybody else?

5 MR. BENZA: Michael Benza, Your
6 Honor.

7 JUDGE MERZ: Michael Benza. Mr.
8 Benza, good morning.

9 MS. LAHOTE: Erica Lahote, Your
10 Honor. L-A-H-O-T-E.

11 JUDGE MERZ: Good morning.

12 MS. LAHOTE: Good morning.

13 MS. LARIMER: Adrienne Larimer,
14 Your Honor. L-A-R-I-M-E-R.

15 JUDGE MERZ: L-A-R-I-M-E-R. Okay.
16 Anybody else?

17 MS. MCGARRY: Kate McGarry.

18 JUDGE MERZ: Kate, good morning.

19 MS. MCGARRY: Good morning.

20 JUDGE MERZ: Anyone else?

21 MR. KOMP: Your Honor, Larry Komp,
22 K-O-M-P.

23 JUDGE MERZ: Good morning, Larry.

24 MR. KOMP: Good morning.

25 JUDGE MERZ: All right. I think

1 that's complete. Anybody else? All right. I
2 have, and I assume everybody else has the agenda
3 that Allen sent. And the first item he has are
4 compliance with the Court order to clarify status.
5 Are there issues there, Allen, that you want to
6 bring to our attention?

7 MR. BOHNERT: Not that I'm aware
8 of, Your Honor, just wanting to make sure that Your
9 Honor had everything that you need regarding
10 Mr. Jackson's representation. I didn't know if
11 anybody else on the call needed to speak to that at
12 all.

13 JUDGE MERZ: Does anyone else on
14 the call need to speak to Cleveland Jackson's
15 representation?

16 MR. PORTER: He's currently only
17 represented by Mr. Porter.

18 JUDGE MERZ: Right, Randall.
19 Thank you. And we'll get back to Cleveland Jackson
20 in a little bit. That's an agenda item of mine.
21 So the next thing in Allen's agenda is discovery
22 matters. Apparently the Plaintiffs have requested
23 documents with respect to Plaintiff Dunlap, and
24 there's some question about the protective order
25 that was entered by Judge Frost in the prior case,

1 and there's an agreed entry before my time
2 extending that to this case. I'm wondering if
3 anybody needs to do anything other than having me
4 enter that order as a protective order for
5 governing this case whether it's agreed to or not?

6 MR. BOHNERT: Your Honor, this is
7 Allen Bohnert. Just to be clear, it was the
8 Defendants have requested production of documents
9 from Plaintiff Dunlap.

10 JUDGE MERZ: Thank you. I beg
11 your pardon. The record should be corrected. It
12 is the Defendants who have asked for production of
13 documents from the Plaintiff.

14 MR. BOHNERT: I raise this, Your
15 Honor, just for the sake of wanting to make sure
16 that Your Honor was aware of the issue that came to
17 light as we were trying to make sure that we were
18 doing everything procedurally correct. And as I
19 pointed out to you, there are some agreed entries
20 in which specific counsel are listed in conjunction
21 with specific clients. Perhaps it's not entirely
22 clear whether the order expanding the protective
23 order runs to the clients regardless of his or her,
24 in most case, his counsel happens to be at any
25 given time or whether it runs to the attorney

1 regardless of who his or her clients happen to be.

2 There's an argument, I think, that
3 could be made in both directions, and so I didn't
4 know if Your Honor wanted to take this opportunity
5 to kind of clarify that particular issue as well as
6 making sure that if it is an attorney-specific
7 focus thing, wanted to know how Your Honor wanted
8 to handle that, whether you wanted to identify
9 specific names or whether broad blanket, you know,
10 by virtue of entering an appearance, counsel also
11 agrees to be bound by the expansion of this
12 protective order, that kind of thing.

13 JUDGE MERZ: Well, my intention
14 would be, and I rather stated it in rather cursory
15 fashion, let me state it again. My intention would
16 be to pull the agreed entry in 04CV1156 and to
17 enter it as a protective order in this case binding
18 all parties and all attorneys whether or not
19 anybody has agreed to it in the past. And I think
20 probably the most expeditious way to deal with that
21 is to put that order on and give everyone, you
22 know, a short turnaround time to file any
23 objections that they may want to file. Any
24 objection to that procedure?

25 MS. SAADEY: Your Honor, this is

1 Zoe Saadey, not on behalf of the Defendants.

2 JUDGE MERZ: Thank you, ma'am.

3 MR. BOHNERT: Your Honor, this is
4 Allen Bohnert. I don't believe so on behalf of the
5 Plaintiffs, although, we can certainly consult with
6 each other, confer, and let Your Honor know rather
7 expeditiously if there, in fact, are any concerns
8 about that.

9 JUDGE MERZ: Good. All right.
10 Good. And as the agenda points out, the motion to
11 stay relating to Plaintiff Awkal, A-W-K-A-L, is
12 briefed and ready for a decision. The agenda
13 accurately notes the pendency of the report
14 recommendations responding, relative to the
15 show-cause order on the unserved drug source
16 defendants and the date of objections being the due
17 date for objections being the 28th which is
18 Thursday of this week.

19 The objections on the motion to
20 dismiss the fourth amended omnibus complaint are
21 ripe. And whether judge, the chief judge is going
22 to decide that himself or recommit it, I do not yet
23 know, but everybody will know virtually as soon as
24 I do. The motion to stay regarding the pendency of
25 the Bucklew, B-U-C-K-L-E-W, versus Precythe case,

1 P-R-E-C-Y-T-H-E, in the United States Supreme
2 Court, we're going to get back to that in just a
3 bit.

4 I appreciate the information about
5 Mr. Tibbetts and Mr. Van Hook's clemency
6 recommendations. The next item on the agenda would
7 be 4(C) procedure with respect to court
8 availability during the Van Hook execution which I
9 do, I don't have any problem proceeding in the same
10 way we did with Mr. Otte and Mr. Campbell. Is
11 there any objection on the part of the State to
12 that?

13 MS. SAADEY: Thank you, Your
14 Honor. This is Zoe Saadey. Your Honor, for the
15 reasons that we previously articulated, Defendants
16 do not or would object to that procedure. The fact
17 that it does take away counsel for the DRC Unit and
18 counsel from the AG's Office on behalf of DRC away
19 from their, you know, main focus during the
20 execution as well as involving members of, at the
21 DRC who are involved in execution such as Donald
22 Morgan who was with us the last time; however, if
23 the Court does deem it appropriate to have this
24 procedure in place again, the Defendants would just
25 ask that the call be, again, very narrowly limited

1 to the purpose for which it would be designed, that
2 being, you know, in the event that counsel for
3 Plaintiffs would need to contact their counterpart
4 in the attorney/witness room and thus, you know,
5 contact the Court, but it just be specifically for
6 that purpose as opposed to, you know, using the one
7 to get updates on the process, if that makes sense,
8 as upon the last time. So that is Defendant's
9 position, Your Honor.

10 JUDGE MERZ: Thank you. I don't
11 recall whether we put on an order either with
12 Mr. Campbell or with Mr. Otte describing that
13 process. I don't think that we did.

14 MS. SAADEY: I do not believe so,
15 Your Honor.

16 JUDGE MERZ: All right. So as of
17 right now, it is the Court's oral order that we
18 proceed in the same way that we did with
19 Mr. Campbell's execution or attempted execution and
20 the, either party would have time from now to
21 object the file objections to get the chief judge
22 to rule on those objections, and we're going to,
23 because it's already the 26th of June, we're going
24 to shorten that objection period to next Monday.
25 So any, if nobody objects by next Monday, we'll

1 proceed as we have intended. I believe someone has
2 joined the conference. Who would that be?

3 MR. KISSINGER: Your Honor, this
4 is Steven Kissinger, the Defendant down in
5 Knoxville. We had a little confusion here as to
6 whether myself or Mr. Ferrell was covering this
7 conference today, and Ms. Werneke very kindly sent
8 me an e-mail and informed me that no one was on the
9 call, so I wanted to get on even though I know
10 we're close to the end.

11 JUDGE MERZ: Did you get the
12 agenda, Steve?

13 MR. KISSINGER: I did get the
14 agenda from Mr. Bohnert.

15 JUDGE MERZ: All right. We're on
16 4(C), and you've, I think you've heard what I said
17 about that. And --

18 MR. KISSINGER: I did.

19 JUDGE MERZ: And, all right. The
20 next item on the agenda is discussion re: expert
21 witness for the Van Hook execution, and tell me
22 what that's about.

23 MR. BOHNERT: Thank you, Your
24 Honor. This is Allen Bohnert. Basically that is
25 to make sure that the Court is perhaps

1 preemptively, maybe prematurely aware of what we
2 might need to do in terms of an expert witness to
3 the Van Hook execution as a discovery matter. If
4 Your Honor recalls, there was a motion, oh, I
5 believe it was for the Phillips' execution to allow
6 Ms. Depas to witness, the person who ended up being
7 a, Ms. Depas, Nurse Depas to witness that execution
8 as an expert healthcare provider.

9 And, ultimately, Your Honor, ended
10 up denying that motion reasoning that Mr. Phillips
11 could choose Ms. Depas as one of his witnesses if
12 he so desired if he wanted that expert witness
13 present. We are at a situation where we may end up
14 needing to, if folks other than Mr. Van Hook in the
15 interest of needing, wanting to obtain discovery
16 evidence from the execution of Mr. Van Hook, if it
17 should go forward that we believe is best obtained
18 or coming from somebody who is medically trained
19 and able to know and give an objective analysis of
20 what was observed.

21 If we are in a position where
22 Mr. Van Hook has chosen to use all of his expert,
23 or all of his witness spots, then we may end up
24 being in a situation of needing to file a motion
25 particularly, again, on behalf of other clients

1 seeking to have a court order to allow one
2 additional witness if that person can be
3 identified. Like I said, there's a lot of moving
4 parts still at this point, and so I don't have
5 anything more definitive yet on that, Your Honor,
6 but I wanted to raise the issue and explain what
7 our reasoning would be so that Your Honor doesn't
8 get, I don't want to say blind-sided, but so that
9 Your Honor doesn't get caught off guard by any such
10 motion if we were to file a motion on that here in
11 the coming days or weeks.

12 That is, that is essentially the
13 purposes, wanting to make sure that particularly as
14 we have seen having somebody who is there who has
15 medical training has, has proven to be fairly
16 significant in terms of identifying what is
17 happening with the individual in a way that lay
18 witness, even a lay witness such as Mr. Porter or
19 myself or Ms. Wright or anybody else who is to this
20 point fairly familiar with the testimony of what
21 has happened in other executions, we believe that
22 it still, particularly with the State's arguments
23 in the past that testimony about what was observed
24 from people who are not medically trained is
25 somehow less than credible.

1 We still believe that it would be
2 important as a matter of best evidence to be able
3 to have somebody there as an objective witness who
4 could be able to document and testify about what
5 happened. So just to give Your Honor a heads-up, I
6 guess, on that that that may be coming down the
7 pipe.

8 JUDGE MERZ: I appreciate the
9 heads-up, Allen. And I do not plan any vacations
10 or medical emergencies between now and the 18th of
11 July, so I expect to be here if that motion gets
12 filed, and there's no sense trying to deal with the
13 motion before it gets filed. So, Zoe, you and
14 Chuck are both alerted that that may be coming and
15 alerted from my prior ruling about what my initial
16 thought about that is, but always pleased to
17 revisit something.

18 All right. So the next thing is a
19 report of the filing of a motion to stay the Van
20 Hook execution arising in the Ohio Supreme Court or
21 as I am advised by my clerks, I should say, the
22 Supreme Court of Ohio that based on the pendency of
23 the O'Neal decision, or mitigation in the Franklin
24 County Common Pleas Court, I have read the decision
25 denying the motion to dismiss in that case. Can

1 you give us any update about how far along that is,
2 Allen?

3 MR. BOHNERT: On this one, Your
4 Honor, I'm going to defer to Mr. Porter.

5 JUDGE MERZ: Right. Randall?

6 MR. PORTER: I believe that the,
7 or the last thing that was filed was the Court's
8 order on the motion to dismiss. About four or five
9 days prior to that, they granted Mr. Van Hook leave
10 to intervene in the lawsuit. At that point when
11 the Court granted the order, it suggested that
12 Mr. Van Hook might do well to try to bifurcate his
13 litigation from the other two Plaintiffs. On June
14 19th that Defendant filed answers, separate
15 answers, excuse me, Your Honor, to Tibbetts and
16 O'Neal and Van Hook, and that's where it currently
17 stands, Your Honor.

18 JUDGE MERZ: All right. So
19 answers filed, no scheduling order about further
20 process in the case, right?

21 MR. PORTER: The Court, I don't
22 have the standing order in front of me, but when
23 the litigation was initially entered, the Court had
24 entered a standing order for purposes of scheduling
25 of, I'll file that with the Court today.

1 JUDGE MERZ: That is most
2 appreciated. All right. So then the one thing
3 that's on the agenda that we haven't yet done is to
4 hear what Plaintiffs may have to say in reply to
5 Defendant's opposition for the motion to stay
6 briefing pending Bucklew.

7 We'll get back to that in a
8 minute. I, even though it's not on the agenda,
9 it's on my mind, and that is the question of
10 whether Mr. Jackson intends to file for preliminary
11 injunctive relief, and, if so, setting a deadline
12 for that. Randall?

13 MR. PORTER: I believe he will,
14 Your Honor. A lot of it will be dependent upon
15 what proceeds in the Van Hook execution, if that,
16 in fact, goes forward. We'd ask the Court if it's
17 going to set a date to file such a motion that it
18 be after the July 18th date.

19 JUDGE MERZ: Right. And that
20 makes all the sense in the world. And, Zoe, I'll
21 turn to you. Do you have a request about a
22 deadline for filing the motion for preliminary
23 injunction with respect to Mr. Cleveland Jackson?

24 MS. SAADEY: Your Honor, if the,
25 with the Court's permission, I would like to

1 consult with my colleagues and with our clients and
2 get back to the Court and Plaintiffs' counsel on
3 that request. I can't speak to that right off the
4 top of my head.

5 JUDGE MERZ: Right. Good. So the
6 best way to do that would be an e-mail both to the
7 Court and to the Plaintiffs' counsel. No. I take
8 that back. Make it a motion, if you want a, if you
9 have a date that you would prefer, put it in a
10 motion, talk with Randall about it before you file
11 it under Local Rule 7.3 to see if he's amenable,
12 and let's make sure we queue it up formally. All
13 right. I'm ready, if no one has anything else, I'm
14 ready to hear the --

15 MR. PORTER: Judge?

16 JUDGE MERZ: Yes.

17 MR. PORTER: This is Randall
18 Porter again. I was belatedly filed with this file
19 with the Court today in Mr. Jackson's case a copy
20 of the pleading filed with the Ohio Supreme Court
21 late on Friday asking for a stay of execution based
22 on the fact that he has newly-appointed counsel.

23 JUDGE MERZ: Oh, okay. So I saw
24 the, I saw the docket entry. I did not look at the
25 text behind it. So it's a newly-appointed counsel

1 motion. It's not based on the pendency of your
2 case in, on the administrative procedure act, and
3 he's not presently a Plaintiff in that case. The
4 Plaintiffs in that case are Tibbetts, O'Neal, and
5 Van Hook, right? Do I got all that right?

6 MR. PORTER: That is correct. The
7 basis for the motion is that new habeas counsel
8 needs more time to prepare for clemency
9 proceedings.

10 JUDGE MERZ: Right. Okay. Good.
11 The, I hesitate to ask, but does the Ohio, does the
12 Supreme Court of Ohio have an expedited docket for
13 things like that or do we know?

14 MR. PORTER: I think the Court
15 will decide it when they want to decide it.

16 JUDGE MERZ: Right. Just like
17 both of us judges who decide what we want when we
18 want. Okay. Then I am ready to hear oral argument
19 in reply in support of the motion to stay briefing.
20 Who is going to handle that?

21 MR. BOHNERT: Your Honor, this is
22 Allen Bohnert. I would welcome the opportunity to
23 discuss with Your Honor the arguments raised both
24 in our motion as well as the arguments that were
25 raised in the reply, in the memorandum in

1 opposition. I guess I should say, first, that it's
2 our, it was our intent by this motion to seek to
3 stay the pleadings consideration in adjudication
4 briefing, etcetera on, on what we consider to be
5 fairly well understood to be dispositive matters,
6 dispositive motions, that is the pending motions to
7 dismiss.

8 One could also say the, although
9 it's not necessarily a motion, it is a dispositive
10 matter, the dismissal of the unserved Defendants
11 but also forthcoming dispositive motions by which
12 we intended to mean motions for summary judgment or
13 motions for judgment on the pleadings. It was not
14 our understanding that a motion for preliminary
15 injunction is a dispositive matter.

16 And, try as I might, I have not
17 been able to find case law that says that a
18 preliminary injunction is, in fact, a dispositive
19 motion or is a dispositive matter. The closest I
20 could get was a case out of the Ninth Circuit that
21 I saw and I remiss that I did not write the name of
22 the case down, but it said, at best, only on
23 certain occasions might a preliminary injunction be
24 considered a dispositive matter. And that is if,
25 in fact, the effect of the preliminary injunction

1 ruling was to dispose of the entire case.

2 JUDGE MERZ: Let me interrupt you,
3 Allen. At this point on exactly that point. As I
4 have thought about this, there, of course, is the
5 possible differential use of the word dispositive.
6 Although the statute doesn't include the word
7 dispositive, the Magistrate's Act treats as
8 dispositive. As you know, a certain number of
9 things that a magistrate judge cannot rule on, and
10 we have an expansion of that statutory list by case
11 law in the Sixth Circuit.

12 So, for example, a motion to
13 remand the state court is treated as dispositive in
14 the sense that a magistrate judge may not decide
15 it. They only recommend a decision, and then if
16 you look at the language of Rule 54(B), it says
17 that an order that disposes of fewer than all of
18 the claims or all the parties, it is not a final
19 order. And I was understanding your use of the
20 word dispositive, I should say Plaintiff's use of
21 the word dispositive, in the motion as referring to
22 more in the nature of the 54(B) matters as opposed
23 to matters excluded from magistrate judge
24 jurisdiction.

25 And I think that's consistent with

1 what you've just said. There might be situations
2 that, I think there is an authority either in the
3 rules or the judicial code for a judge to
4 accelerate the trial on the merits to the trial on
5 preliminary injunction. We have not done that in
6 this case, don't expect that we ever would do that
7 in this case, can't do that given the divergence of
8 some Plaintiffs consenting and some not, but I
9 needed to make sure about what you meant by
10 dispositive, and I think you've now made that
11 clear. Go ahead.

12 MR. BOHNERT: Yes, Your Honor.
13 And I guess to that point, what we were asking for
14 in this motion is essentially very consistent, if
15 not simply analogous to what has happened in other
16 junctures in this long and winding case. There is
17 certainly precedent in this case to stay, you know,
18 in particular proceedings including to stay
19 pleading deadlines, to stay consideration of
20 motions to dismiss, to stay consideration of
21 summary judgment motion in light of the fact that
22 further developments were expected in the
23 relatively near term, a relative near term.

24 And at times that near term has
25 been a year, year and a half, certainly longer than

1 would be expected in this particular situation when
2 Defendant's position, notwithstanding, it certainly
3 is the case that we would have a decision from the
4 Supreme Court in Bucklew, one would think no later
5 than next June, certainly June of 2019, I think, by
6 the conclusion of the October 2018 terms.

7 It's not clear yet from the docket
8 at the Supreme Court when the Court intends to hear
9 oral arguments in the case, but one can think that
10 certainly this would be a case, as all cases are,
11 would be from the October '18 term that that will
12 be decided no later than June 2019. And so I would
13 point Your Honor to, for instance, ECF Number 56
14 which was a motion to stay the amended pleading
15 deadline granted by ECF Number 62 over the
16 Defendant's objections, similar to the objections
17 they raised here about delay and time limit.

18 A similar type of order was
19 granted at ECF Number 69, 73, 74, seeing also
20 number 77 and 94. The motions, you know, and to
21 the concern about not being able to have a motion
22 for preliminary injunction filed while other
23 matters are stayed, that should not be a concern.
24 I point Your Honor, for instance, to the fact that
25 during that pendency that I just referred to of a

1 stay, there was a motion for preliminary injunction
2 and TRO file on behalf of Mr. Wiles which was filed
3 on February 15th, 2012 even after the stays of the
4 amended pleading deadlines was granted back in
5 January of 2012, that Wiles' motion was ultimately
6 adjudicated after a 7-day hearing and decided on
7 April 4, 2012 and, again, while there was a stay of
8 amended pleadings that remained applicable.

9 ECF Number 117 entered May 24,
10 2012, in that one the Court continues to stay all
11 pleading deadlines and all briefing deadlines
12 regarding the pending motions to dismiss, similar
13 to what we had proposed here. And I will note
14 even, you know, if it's a matter of Your Honor's
15 concern about Biden's list or anything.

16 JUDGE MERZ: No. No. No. No.
17 No.

18 MR. BOHNERT: We're supposed to
19 use, if there's concern about that, I know that in
20 the past Judge Frost had ordered those motions to
21 dismiss to be terminated administratively. I am
22 presuming that that has something to do with the
23 list of pending motions with the express
24 understanding that those motions could be
25 reinstated or reactivated at a later point in time

1 should the Defendants choose to want that to
2 happen. So even if the motion to dismiss remain
3 operative, consideration of them would stay until,
4 in that situation, the motion, there was discussion
5 on or about May 24th, 2012.

6 Consideration of any of those
7 motions to dismiss was delayed until at least
8 January 7 of 2013, so there was approximately 7
9 months from the order and almost 12 months from the
10 earlier order which, again, was issued on January
11 19th of 2012. Ultimately it looks like the
12 Defendants did withdraw those motions to dismiss
13 officially and still stayed until January 27th,
14 2013.

15 I'll also note that on May 18th,
16 2012, again, during that pendency period when
17 certain matters were stayed, there was a motion for
18 preliminary injunction, stay of execution filed on
19 behalf of Mr. Awkal and Mr. Eley. That's ECF
20 Number 111 that was adjudicated and decided several
21 days later, ECF Number 116 as well as a motion to
22 amend or modification or reconsideration that was
23 denied three or four days later at ECF Number 120.

24 There was also a motion for
25 preliminary injunction, stay of execution filed on

1 behalf of Mr. Hartman on October 5th, 2012 at ECF
2 Number 130. A hearing was held for that motion on
3 November 1st, 2012. The motion was denied on
4 November 5th, 2012, ECF Number 136. And, again,
5 another example of a motion for preliminary
6 injunction stay that occurred during pendency
7 period, pleading deadlines were stayed. There was
8 a motion for preliminary injunction and stay of
9 execution filed on behalf of Plaintiff Post that
10 was filed on November 19, 2012 at ECF Number 139.

11 There was a hearing scheduled for
12 that motion scheduled for December 17, 2012.
13 Discovery was taken. The hearing was prepared by
14 all parties. We gathered at the Court for the
15 start of that hearing on the morning of December
16 17, 2012. At that point we were advised that there
17 were matters in the works with the governor's
18 office, and the hearing was continued until later
19 that afternoon. Ultimately, the hearing was
20 cancelled because the governor decided to commute
21 Mr. Post's sentence, but you can see that in ECF
22 Number 149.

23 So I bring all these up, Your
24 Honor, just simply as a way to point out to Your
25 Honor that the framework within which the

1 Defendants are trying put this request is not
2 actually accurate, that it is, in fact, possible,
3 and it has, indeed, happened before, and that we
4 can, in fact, stay consideration, activity
5 pleadings, adjudication on the matters that we were
6 referring to, pending motions to dismiss, perhaps
7 the dismissal of the unserved Defendants, and any
8 forthcoming for summary judgment or motion for
9 judgment on the pleadings.

10 Until and unless we do have
11 direct, one would hope, direct guidance from the
12 Supreme Court in the form of whatever it is that
13 they do with the Bucklew decision, as we pointed
14 out in our motion, we believe that the Bucklew case
15 does, indeed, present several different aspects
16 that we don't believe, well, we disagree with the
17 Defendants' position that the Bucklew matter is a
18 very, very narrow specific individual, specific
19 issue, and obviously it's going to be much broader
20 than that by the time that one considers the
21 Court's analysis and reasoning as well as the
22 specific ultimate end result in that case.

23 I would also offer that the State
24 doesn't actually, in their memo in opposition,
25 offer a rebuttal to that point that it is prudent

1 to wait for the decision in analysis in Bucklew.
2 Their only argument is to simply say at the bottom
3 of page 3 of their reply memorandum as the
4 magistrate judge has also noted, the standard
5 governing of request for preliminary injunction
6 stay includes the requirement that the Plaintiff
7 demonstrate a substantial likelihood of success on
8 the merits. It follows that any guidance provided
9 by the Supreme Court would also be relevant to that
10 threshold question.

11 And on those points, we are in
12 agreement that the guidance provided by the Supreme
13 Court would be relevant to that threshold question
14 of whether the alternative execution methods and
15 whatnot must be part of the Plaintiff's claims if
16 then they say, therefore, are awaiting such
17 guidance which might be forthcoming in Bucklew does
18 not justify the resultant lengthy unknown delay in
19 the final adjudication of the Plaintiff's claims.

20 To us that, I'm not sure I
21 understand the logical connection there, but, in
22 any event, we believe that the issues, even as the
23 Defendants have laid them out, recognize that
24 Bucklew will have effect on the claims that are at
25 issue before the Court. And, therefore, again,

1 prudence and, frankly, judicial efficiency, counsel
2 in favor of pausing consideration on these matters
3 until we have that guidance from the Court.

4 JUDGE MERZ: Thank you, Allen.
5 Zoe, or Chuck, any response?

6 MR. WILLE: Yes, Your Honor. This
7 is Chuck Wille. First, Your Honor, as the Court is
8 aware, the Court has, we understand the Court has
9 discretion in these areas but that, of course, that
10 discretion is not unlimited. We would submit, Your
11 Honor, that in exercising that discretion what is
12 important is the current status of the case versus
13 what the status of the case was in the past, where
14 any such stays of adjudication or pleadings were
15 issued.

16 We would submit, Your Honor, that
17 it's the current status of the case that is
18 appropriate and that under the current status, no
19 good cause has been shown for the broad request for
20 a stay that has been, has been made. Your Honor,
21 first, again, we would point out as Your Honor
22 noted that in a certain sense is the Plaintiffs are
23 saying that this would not apply to any preliminary
24 injunction motions, but as Your Honor has pointed
25 out, one of the components or an essential

1 component of showing the need for preliminary
2 injunction is to show a substantial likelihood of
3 success on the merits as we pointed out in our
4 opposition and as the Court, again, I think, has
5 seen the logic here that obviously if there's any
6 guidance issued by the Supreme Court in Bucklew,
7 Bucklew, that guidance would pertain to the
8 question of the substantial likelihood of success.

9 Now, in essence, it seems to us
10 that what the Plaintiffs propose here is that no
11 preliminary injunction proceeding should be
12 delayed. In other words, Plaintiffs proposed that
13 they could, indeed, seek preliminary relief without
14 waiting for guidance from the Supreme Court whereas
15 they seem to want to have the cake and eat it, too,
16 is the saying. But, on the other hand, we would
17 like to have the Court delay any final adjudication
18 in order to wait for Supreme Court guidance.

19 So we would submit that is
20 inconsistent to do that, that court system is the
21 first point that we made. Secondly, Your Honor, I
22 would point out that in this case apparently the
23 request also extends to, for example, the Court's
24 adjudication as to Defendant's motion to dismiss
25 the fourth part of this complaint. We would note,

1 Your Honor, that in that complaint the Plaintiffs
2 have withdrawn their 8th amended complaint.

3 The Defendant has moved to dismiss
4 numerous other claims on grounds we do not
5 anticipate that the Supreme Court's decision in
6 Bucklew would have anything to say about. For
7 example, Your Honor, we do not anticipate that the
8 Supreme Court will address the question of whether
9 a violation of state and federal law would be a,
10 first, a violation of the protection clause. We do
11 not believe the Supreme Court's going to give any
12 guidance on the, relevant to the Plaintiffs'
13 numerous equal protection claims which have been
14 the subject of Defendant's motion dismiss the, on
15 this complaint.

16 Thirdly, Your Honor, we would ask
17 the Court to take a look at the questions
18 presented, and those questions presented, indeed,
19 concerned what has been described by the prisoner
20 in that case as a rare and severe medical
21 condition. Now, we would note, Your Honor, that
22 certainly the Supreme Court takes cases because
23 they intend to take cases that have greater
24 importance than the facts as true, but by the same
25 token, as Your Honor is aware, sometimes the

1 Supreme Court decides to take a little narrower
2 approach to giving cases.

3 So it is certainly possible that
4 this Bucklew case could turn on the precise
5 questions presented in the context of what has been
6 described as a severe and rare medical condition.
7 So it could be that Bucklew will not provide the
8 general greater guidance that it possibly could,
9 could be otherwise. We would also note, Your
10 Honor, that in the question that was presented to
11 the parties by the Court, that question seems to
12 assume that the Plaintiffs have a high burden to
13 show, to present and to validate their claims under
14 the 8th Amendment.

15 So in a certain sense, the Court
16 seemingly has presumed already the existence of the
17 standard under Glossip versus Gross which, of
18 course, the Defendants have urged and have argued
19 is a very severe and very difficult standard to
20 meet. And thus far, it seems, Your Honor, that
21 that argument has carried today with respect to the
22 Sixth Circuit Court of Appeals. I guess I'm
23 saying, Your Honor, that perhaps the Bucklew case,
24 the way the Court has presented the question to the
25 parties, we would not anticipate any change if that

1 particular standard being forthcoming.

2 So for these reasons, Your Honor,
3 again, we would ask that, we would ask the Court to
4 deny the motion. We would only say one other
5 thing, Your Honor, and that is that counsel has
6 noted, this is in the past or the case has been
7 delayed, but, again, Your Honor, we think it,
8 again, what counts here is the current status of
9 the case. But we would also note, Your Honor, that
10 the Court certainly can consider that this case has
11 been going on for many years, and one could go back
12 to 2004.

13 You could say this case has been
14 going on for 14 years. That's certainly a relevant
15 consideration. And as the case proceeds further,
16 it is legitimate for the Defendants to say, to
17 point out that, indeed, as the case continues to go
18 forward, continues delay, it is legitimate for the
19 Defendants to put that, point to that as a factor
20 in expediting the Court's discretion.

21 JUDGE MERZ: Thank you, Chuck.
22 One point that I will ask about is my reading of
23 things that the Eighth Circuit's ruling in this
24 case that a single witness must do the comparison
25 between the State's method of execution and any

1 alternative. That's an, as I read the briefs in
2 Bucklew, that's an outlier. No other circuit has
3 held that, have they?

4 MR. WILLE: Your Honor, I think
5 the question was presented in the context of what
6 was really presented in that case. In other words,
7 I don't think, I don't think the Eighth Circuit
8 held that, oh, yes, you must produce only one
9 witness. I think the question was framed in terms
10 of what was actually presented in the case. I
11 think the overall question is, again, to what is
12 the, to what extent did the Court of Appeals error
13 in finding that there was, in affirming the
14 summary, affirming judgment for the State.

15 JUDGE MERZ: Right.

16 MR. WILLE: So I don't think it
17 was a particular, I don't believe the Eighth
18 Circuit held that, yes, you must produce one
19 witness. I don't think that's really the holding
20 of the Court that's at issue.

21 JUDGE MERZ: All right. Allen?

22 MR. BOHNERT: Your Honor, I don't
23 know that I can speak that particular specific
24 facet. I, yeah. I don't know at the moment off
25 the top of my head without having a chance to look

1 at it, it's specific. I will say that, I guess, in
2 kind of rejoinder to the points that Mr. Wille was
3 making, I'm finding it hard to understand the, what
4 I hear to be the basic argument is that the motion
5 is simultaneously too broad and should be denied
6 because it is simultaneously too broad, but it's
7 also not broad enough because it doesn't include
8 preliminary injunction stay motions, and so,
9 therefore, it should be denied for that reason.

10 So we're being faulted for somehow
11 being overbroad without ever having that actually
12 defined. I don't think we are being too broad. I
13 think we've been very specific about what it is
14 that we're asking for. And if it's a motion to
15 deny, because we're not asking for a preliminary
16 injunction and stay of execution by way of it, to
17 me is, it doesn't make a whole lot of sense, Your
18 Honor.

19 JUDGE MERZ: All right. Thank
20 you. Thank you.

21 MR. BOHNERT: The, yes.

22 JUDGE MERZ: Thank you. That's
23 adequate.

24 MR. BOHNERT: Okay.

25 JUDGE MERZ: So the, I don't know

1 whether anything else has come up in anybody's mind
2 that needs to be added to the agenda or if we are
3 at an end except we need to schedule the --

4 MR. BOHNERT: Give me one second,
5 Your Honor. I'm trying to determine here the
6 answer to your question. According to the third
7 petition, the panel refused to accept the expert's
8 evidence in the Bucklew case comparing two methods
9 because no single witness said that one method
10 would be better than the other. And so, you know,
11 the panel in that case believed Glossip not only
12 requires an as-applied challenge to present
13 evidence comparing the State's method with an
14 alternative, but that the evidence must come in the
15 form of a single witness who believes one method is
16 significantly better than the other. They made the
17 point --

18 JUDGE MERZ: My --

19 MR. BOHNERT: Go ahead. I'm
20 sorry.

21 JUDGE MERZ: My reading of the
22 precedent is that's an outlier, that there's no
23 other circuit that has held anything like that.
24 Certainly the Sixth Circuit has not. I don't find
25 that implication from Glossip at all. This would,

1 in my mind, if I were sitting on the United States
2 Supreme Court, be a good, which they obviously
3 haven't done, would be a good situation for grant,
4 vacate, and reverse on that particular item.

5 I can't believe that the Supreme
6 Court is willing to accept that as a general rule.
7 Certainly the Sixth Circuit has not. So, but there
8 are, as you say, there are broader issues before
9 the Court in Bucklew, and it appears to want to do
10 something more. Anyway, we need to set a next
11 date, and I'm prepared to hear suggestions. Allen?

12 MR. BOHNERT: Yes, Your Honor. I
13 had looked at this earlier but have not had a
14 chance to consult with my co-counsel. I was going
15 to suggest two weeks from now, which would be July
16 10. But, like I said, I had not had a chance to do
17 anything regarding consultation with other counsel,
18 so I did not want to affirmatively put that on the
19 agenda as, with Plaintiff's proposal.

20 JUDGE MERZ: Any objection to that
21 date from other Plaintiff's counsel? Any Defense
22 objection?

23 MS. SAADEY: I do not believe so,
24 Your Honor.

25 (Phone interruption.)

1 JUDGE MERZ: All right. Good.
2 Hold on a second while I get rid of this call about
3 my student loans. Thank you. All right. We'll
4 set the next conference for 9 o'clock a.m. on the
5 morning of July the 10th, and I'll be getting
6 sometime relatively soon from the Defendants a
7 motion to set a deadline for filing a motion for
8 preliminary injunction in Mr. Jackson's case. The
9 Awkal motion is now ripe, and the motion to stay is
10 now ripe, and I will do something, as I said
11 before, about the entry on the protective order
12 entry once we have a chance to get a transcript.
13 Anything else --

14 MR. GRAY: Excuse me, Your Honor?

15 JUDGE MERZ: Yes.

16 MR. GRAY: This is Steve Gray,
17 chief counsel, DRC. That date of July 10th Jocelyn
18 and I have a status briefing for the Van Hook
19 scheduled execution that morning at 8:30. Could we
20 do our conference with Your Honor at 9:30 on July
21 10th, please?

22 JUDGE MERZ: That's fine. Any
23 objection to that, Allen?

24 MR. BOHNERT: No, Your Honor.

25 None as far as I know.

1 JUDGE MERZ: 9:30 it will be. All
2 right.

3 MR. GRAY: Thank you, Your Honor.

4 JUDGE MERZ: Thank you all very
5 much.

6 (WHEREUPON, telephonic conference
7 hearing concluded at 9:57 a.m.)

8 * * * * *

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Jamie S. Hurley, a Court Reporter
and Notary Public do hereby certify that the
foregoing is a full, true and correct transcript of
my notes taken in the above-styled case and
thereafter transcribed by me.

Jamie S. Hurley